



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: MARAGA, MUSINGA, MURGOR JJ, A)**

**CRIMINAL APPEAL NO. 58 OF 2013**

**BETWEEN**

**JOSEPH OWINO ODERA.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**(Appeal from the judgment of the High Court of Kenya at Kisumu**

**(Ali- Aroni, J) dated 13<sup>th</sup> March 2012.**

**in**

**H.C.CR.A. NO. 116 OF 2011)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

The appellant, **JOSEPH OWINO ODERA** was tried by the Senior Resident Magistrate's court at Bondo on a charge of defilement of a girl child contrary to **section 8 (1)** as read with **section 8(2) the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that on 3<sup>rd</sup> August 2011, at [Particulars Withheld] area in south west Gem location, in Siaya County within Nyanza Province, the appellant unlawfully and intentionally caused his penis to penetrate the vagina of a girl child aged 10 years namely, **FCA (PW 1), the complainant**.

The brief facts of the case are that on 3<sup>rd</sup> August 2011 at about 1pm, when FCA was playing with other children the appellant called her, and told her that her mother was calling her. FCA rushed home only to learn that her mother had been admitted in hospital. The appellant who had followed her home caught hold of FCA; pushed her on her mother's bed, removed her clothes and defiled her.

FCA reported the matter to her aunt, who took her to Akala health centre, where she was examined, treated and issued with a P3 form. A report was also made at Akala Police station, and the appellant was arrested and charged with the offence.

When the plea was read out the appellant stated,

**“...facts are correct. It is true I defiled the minor but I used a condom.”**

The learned trial magistrate proceeded to enter a plea of guilty, and convicted the appellant on his own plea. The appellant pleaded for leniency, and was sentenced to 45 years' imprisonment.

Being dissatisfied with the sentence ordered by the trial court, the appellant appealed to the High Court against the sentence. In her judgment, *Ali-Aroni, J*, dismissed the appeal, upheld the conviction but enhanced the sentence to life imprisonment.

Being further aggrieved by the decision of the High Court, the appellant filed a second appeal to this Court which in the main is against the enhancement of the sentence by the High Court, which the appellant contends was without regard for his ill health and mental torture by the police.

In his submissions, the appellant stated that he was tortured, and as a result he was unable to remember anything when his plea was taken in court, and which was the reason for his having pleaded guilty. He stated. That he had not informed the court at the time that he had been tortured. He further stated that the sentence was severe having regard to the circumstances of the case.

**Mr. Sirtuy**, learned Principal Prosecution Counsel, opposed the appeal and supported the sentence. Counsel submitted that the sentence arose from the plea of guilty. On the issue of torture, counsel contended that the issue was not raised before the courts below, and that it was raised in this Court for the first time and as such was an afterthought. Counsel concluded that the enhanced sentence was lawful, and as by law prescribed.

On the issue of torture, the record shows that this issue was not raised in the courts below, and that it has been raised in this Court for the first time. We consider this to be an afterthought, and as such this ground fails.

On the issue of the enhanced sentence, **section 8 (1)** as read with **section 8(2) the Sexual Offences Act No. 3 of 2006** imposes a life sentence for the defilement of a child under the age of 11 years. From the record, the complainant was aged 10 years. When the High Court considered the complainant's age, it found the sentence of 45 years to be unlawful, an enhanced it to life imprisonment as specified under **section 8 (2)** of the **Sexual Offences Act**.

We are satisfied that the sentence as enhanced by the High Court was in accordance with the law.

On the severity of the sentence, **section 361 (1) (a)** of the **Criminal Procedure Code** provides,

**“A party to an appeal from a subordinate court may, subject to subsection (8) appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section :-**

**a. on a matter of fact and severity of sentence, is a matter of fact**

**or,**

**b) against a sentence, except where a sentence has been enhanced by the High Court.....”**

In the case of **Paul Tanui vs Republic (2010) eKLR**, this Court stated thus,

**“Second appeals to this court are on a point of law only and the severity of sentence is expressly a matter of fact (see Section 361 (1) (a) of the Criminal Procedure Code). It is clear that an appeal against the severity of the sentence as opposed to the legality of the sentence is not maintainable.”**

The appeal herein is with respect to the severity of the sentence. This is a matter of fact and not an issue

of law. Pursuant to **section 361 (1) (a)**, we find that we have no jurisdiction to interfere with the lawful sentence as enhanced by the High Court.

As a consequence, this appeal must fail, and it is therefore dismissed.

It is so ordered.

**DATED and DELIVERED at KISUMU this 24th day of July 2015**

**D.K.MARAGA**

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**JUDGE OF APPEAL**

**D.K. MUSINGA**

.....

**JUDGE OF APPEAL**

**A.K.MURGOR**

.....

**JUDGE OF APPEAL**

I certify that this is

a true copy of the original

**DEPUTY REGISTRAR**